Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1022–05 OF 2019
LEE SWEE SENG, AHMAD NASFY AND SEE MEE CHUN JJCA
18 MAY 2022

Companies and Corporations — Derivative action — Leave to initiate derivative action — Whether applicant showed he was acting in good faith and that it was prima facie in best interest of company that leave was granted — Whether there was existence of good cause of action which had reasonable prospect of success — Whether applicant had collateral purpose in wanting to initiate derivative action — Companies Act 2016 ss 347(1) & 348(4)

The respondent was a joint-venture company formed by two entities, Azimuth Marine ('AM') and Nautical Supreme ('NS'), to provide tug boat services to a third party, Vale. AM was the majority shareholder in the respondent while NS was the minority shareholder. In keeping with that shareholding, five nominees of AM formed the majority directors of the respondent whilst two nominees of NS formed the minority directors, one of whom was the appellant. One of the majority directors was a Capt Suresh, who owned a corporation ('ASM') which was appointed by the respondent to manage its tug boat operations and services for a period of 15 years. When one of the respondent's tug boats ('NTT Lumut') sank while berthed along a jetty in Perak, the appellant within days of the incident sent an email to the respondent's board of directors ('BOD') holding Capt Suresh and ASM liable for the incident. Investigations by the marine department and by the insurer's loss adjuster, however, concluded that no party was negligent and that the vessel's sinking was caused by inclement weather and extremes of tidal conditions given the long period of time the vessel had been parked at the jetty. The appellant, however, never stopped harrassing the BOD to have an independent investigation into the incident even after the insurers had paid an amount that exceeded the then value of the vessel and the amount it would have cost to repair and put it back into service. The appellant engaged an expert ('Loynd') to give an opinion about the incident. Loynd's report said that he did not have sufficient evidence to fully explain the cause of the sinking and raised several questions that required answers, pending which he opined that the incident could have been prevented. Based on Loynd's report, the appellant urged the BOD to grant Loynd unrestricted access to inspect the wreckage of the vessel and make his findings but the board rejected the request. The appellant then issued a statutory notice under s 348 of the Companies Act 2016 ('the CA') which compelled the BOD to agree to an independent investigation for which it contemplated appointing surveyors. The appellant, however, voted against the

proposal and wanted two experts to be appointed — one each by the majority and the minority directors. When the BOD refused the request, the appellant applied to the High Court for leave under ss 347–348 of the CA to commence a derivative action in the name and on behalf of the respondent against ASM for negligence in causing the sinking of the vessel. The instant appeal was against the High Court's dismissal of the leave application.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) It was common ground that in order for leave to be granted, the appellant had to prove that he was acting in good faith and that it was prima facie in the best interest of the company that leave was granted. Good faith entailed an honest belief that a good cause of action existed which had a reasonable prospect of success. It must also not be for a collateral purpose (see paras 52 & 56).

(2) The proposed cause of action was against ASM in negligence. The High Court found the appellant's reliance on Loynd's reports wanting. This court agreed with that finding. The fact that the appellant sought unrestricted access for Loynd to inspect the wreckage, complete his investigation and deliver his final report itself showed that Loynd's reports were not final. By no means could such a report form the basis for a good cause of action in negligence. On the other hand, there were reports from the marine department and the insurer's loss adjuster that pointed to no negligence. The sum total of the latter reports coupled with the issuance of the document of compliance showed no negligence on ASM's part. The cause of the sinking was attributed to inclement weather and tidal conditions (see paras 57–62).

(3) The appellant had an ulterior motive in continually demanding for an independent investigation. His first response, nine days after the vessel's sinking, was to send an email to the chairman of the BOD saying that Capt Suresh and ASM ought to be held liable. And when the BOD finally acceded to an independent investigation, he rejected it and asked for two experts to be appointed — one by the majority directors and one by the minority directors — at the respondent's expense (see paras 65 & 68).

(4) The High Court was conscious of the fact that the majority and minority directors had disputes that were the subject-matter of ongoing litigation. It was against that backdrop coupled with no evidence of negligence and the possibility of legal impediments that the High Court found it difficult to conclude that there was good faith. It could not be said that the appellant had made out a good cause of action which had a reasonable prospect of success such that the required good faith on his part had been established (see paras 78 & 81).

(5) Section 348(4)(b) of the CA required the court to take into account whether it appeared prima facie to be in the best interest of the company that leave be granted. The High Court judge started on the footing that the factors to be considered would be the same as those that established good faith. Consequently, this would mean that it was not in the best interest of the company if there was no evidence to support a good cause of action which had a prospect of success (see paras 82 & 89).

(6) One of the grounds in the leave application was that the sinking of the NTT Lumut had a substantial financial impact on the respondent. However, given the huge pay-outs under the MH and PI policies and the close-out compensation sum from Vale, there was no financial loss to the respondent, which meant that it was not prima facie in the interest of the respondent for the derivative action to proceed (see para 90).

(7) The High Court was correct in holding that the respondent's long-standing relationship with Vale — its only customer and the reason why the respondent was incorporated — would be affected if a claim was made against ASM. The 13 February 2018 letter from Vale to the respondent was most relevant where Vale had considered the incident closed with the close-out agreement. The potential legal costs of the intended litigation also had to be considered and weighed against what the respondent had already received from the insurance monies and from Vale. Weighing the cost, risk and distraction the intended litigation would cause, it could not be said that the litigation would be prima facie in the best interest of the respondent (see paras 91 & 94–95).

[Bahasa Malaysia summary

Responden adalah syarikat usaha sama yang dtubuhkan oleh dua entiti, Azimuth Marine ('AM') dan Nautical Supreme ('NS'), untuk menyediakan perkhidmatan bot tunda kepada pihak ketiga, Vale. AM adalah pemegang saham majoriti dalam syarikat responden manakala NS adalah pemegang saham minoriti. Menurut pegangan saham tersebut, lima penama AM telah melantik pengarah-pengarah majoriti di syarikat responden manakala dua penama NS melantik pengarah-pengarah minoriti, salah seorang daripada mereka adalah perayu. Salah seorang pengara-pengarah majoriti tersebut adalah Kapten Suresh, yang memiliki sebuah syarikat ('ASM') yang dilantik oleh syarikat responden untuk menguruskan operasi dan perkhidmatan bot tundanya untuk tempoh 15 tahun. Apabila salah satu bot tunda responden ('NTT Lumut') tenggelam semasa berlabuh di sepanjang jeti di Perak, beberapa hari sebelum itu, perayu telah menghantar emel kepada lembaga pengarah responden ('LP') yang meletakkan liabilti kepada Kapten Suresh dan ASM untuk bertanggungjawab atas kejadian tersebut. Siasatan oleh jabatan marin dan oleh penyelaras kerugian syarikat insurans, menyimpulkan bahawa tiada pihak yang cuai dan kapal tersebut tenggelam disebabkan oleh cuaca buruk dan keadaan pasang surut yang melampau dan jangka masa yang

panjang kapal tersebut diletakkan di jeti. Perayu walau bagaimanapun, tidak berhenti memaksa LP untuk melakukan siasatan bebas terhadap kejadian tersebut walaupun selepas penanggung insurans telah membayar jumlah yang melebihi nilai kapal ketika itu dan bayaran untuk membaiki kapal tersebut untuk kembali berfungsi. Perayu telah melantik pakar ('Loynd') untuk memberi pendapat mengenai kejadian tersebut. Laporan Loynd mengatakan bahawa dia tidak mempunyai bukti yang mencukupi untuk menjelaskan sepenuhnya punca kapal tersebut tenggelam dan berpendapat bahawa kejadian tersebut dapat dielakkan. Berdasarkan laporan Loynd, perayu menggesa LP untuk memberikan Loynd akses tanpa had untuk memeriksa bangkai kapal tersebut dan membuat penemuannya tetapi LP menolak permintaan tersebut. Perayu kemudian mengeluarkan notis statutori di bawah s 348 Akta Syarikat 2016 ('AS') yang memaksa BOD untuk bersetuju dengan siasatan bebas untuk melantik juruukur. Perayu bagaimanapun mengundi menentang cadangan tersebut dan mahu dua pakar dilantik — masing-masing satu oleh pengarah majoriti dan pengarah minoriti. Apabila LP menolak permintaan tersebut, perayu memohon kepada Mahkamah Tinggi untuk kebenaran di bawah ss 347–348 AS untuk memulakan tindakan derivatif atas nama dan bagi pihak responden terhadap ASM kerana kecuaian dan menyebabkan tenggelamnya kapal tersebut. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan kebenaran tersebut.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Secara umumnya, alasan untuk permohonan kebenaran diberikan, perayu harus membuktikan bahawa dia bertindak dengan niat baik dan adalah dengan prima facie demi kepentingan terbaik syarikat yang kebenaran tersebut diberikan. Niat baik meliputi kepercayaan jujur bahawa ada tindakan yang memiliki prospek tindakan tersebut akan berjaya secara munasabah. Ianya juga tidak boleh untuk tujuan kolateral (lihat perenggan 52 & 56).

(2) Kausa tindakan yang dicadangkan terhadap ASM dalam kecuaian. Mahkamah Tinggi mendapati perayu bergantung kepada laporan Loynd. Mahkamah ini bersetuju dengan penemuan tersebut. Fakta bahawa perayu memohon untuk akses tanpa had untuk Loynd untuk memeriksa bangkai kapal, menyelesaikan siasatannya dan menyampaikan laporan terakhirnya sendiri menunjukkan bahawa laporan Loynd tidak muktamad. Tidak semestinya laporan sedemikian boleh menjadi asas untuk kausa tindakan yang baik untuk tuntutan kecuaian. Sebaliknya, terdapat laporan dari jabatan marin dan pelaras kerugian penanggung insurans yang menunjukkan tiada kecuaian. Laporan tersebut dan dokumen pematuhan menunjukkan bahawa tiada kecuaian di pihak ASM. Punca kapal tersebut tenggelam adalah disebabkan oleh cuaca buruk dan keadaan pasang surut (lihat perenggan 57–62).

(3) Perayu mempunyai motif tersembunyi untuk menuntut siasatan bebas. Tindak balas pertamanya, sembilan hari setelah kapal tersebut tenggelam, adalah mengirim emel ke pengerusi LP yang mengatakan bahwa Kapten Suresh dan ASM harus bertanggungjawab. Apabila LP akhirnya bersetuju dengan siasatan bebas, dia menolaknya dan meminta dua pakar dilantik — satu oleh pengarah majoriti dan satu oleh pengarah minoriti — dan ditanggung oleh responden (lihat perenggan 65 & 68).

(4) Mahkamah Tinggi menyedari bahawa pengarah majoriti dan minoriti mempunyai pertikaian yang merupakan perkara asas litigasi yang sedang berjalan. Berdasarkan perkara tersebut dan tiada bukti kecuaian dan halangan undang-undang, Mahkamah Tinggi mendapati sukar untuk membuat kesimpulan bahawa terdapat niat baik. Perayu tidak menunjukkan kausa tindakan yang baik yang mempunyai prospek untuk berjaya secara munasabah yang juga menunjukkan niat baik ketika memfailkan permohonan (lihat perenggan 78 & 81).

(5) Seksyen 348(4)(b) AS mengkehendaki mahkamah mengambil kira sama ada secara prima facie permohonan tersebut adalah untuk kepentingan terbaik syarikat yang mana permohonan kebenaran boleh diberikan. Hakim Mahkamah Tinggi berada memutuskan berdasarkan faktor-faktor yang perlu dipertimbangkan tersebut mempunyai niat baik. Oleh itu, mahkamah mendapati tiada kepentingan kepada syarikat sekiranya tiada bukti untuk menyokong kausa tindakan yang baik yang mempunyai prospek tuntutan tersebut akan berjaya (lihat perenggan 82 & 89).

(6) Salah satu alasan dalam permohonan kebenaran tersebut adalah tenggelamnya NTT Lumut menyebabkan kesan kewangan yang besar terhadap responden. Walau bagaimanapun, memandangkan terdapat bayaran yang besar di bawah polisi MH dan PI dan bayaran pampasan dari Vale, tidak wujudnya kerugian kewangan kepada responden. Ini bermaksud bahawa secara prima facie ianya adalah bukan demi kepentingan responden untuk tindakan derivatif ini diteruskan (lihat perenggan 90).

(7) Mahkamah Tinggi adalah betul ketika memutuskan bahawa hubungan lama responden dengan Vale — satu-satunya pelanggan dan sebab responden diperbadankan — akan terjejas sekiranya tuntutan dibuat terhadap ASM. Surat bertarikh 13 Februari 2018 daripada Vale kepada responden adalah paling relevan di mana Vale telah mempertimbangkan kejadian tersebut telah diselesaikan dengan perjanjian secara tertutup. Potensi kos undang-undang litigasi juga perlu dipertimbangkan dan perlu diseimbangkan dengan bayaran wang insurans yang telah diterima oleh responden dan bayaran daripada Vale. Setelah mengimbangi kos, risiko dan halangan oleh proses litigasi tersebut, tidak boleh dikatakan bahawa proses litigasi tersebut adalah untuk kepentingan terbaik

responden secara prima facie (lihat perenggan 91 & 94–95).]

Cases referred to

Abdul Rahim bin Suleiman (suing as the director and minority shareholder of Semangat Motor Sdn Bhd and in the interest of Semangat Motor Sdn Bhd) & Anor v Faridah bt Md Lazim & Ors [2016] 6 MLJ 449, CA (folld)
Ang Thiam Swee v Low Hian Chor [2013] 2 SLR 340, CA (refd)
Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636, CA (not folld)
Gard Marine & Energy Ltd v China National Chartering Co Ltd; The Ocean Victory [2018] 1 All ER 832, SC (refd)
Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor [2015] 11 MLJ 604, HC (refd)
Pang Yong Hock and another v PKS Contracts Services Pte Ltd [2004] 3 SLR 1; [2004] 3 SLR(R) 1, CA (refd)
State of South Australia and another v Marcus Clark (1996) 19 ACSR 606, SC (refd)
Tai May Chean v United Eastern Resources Sdn Bhd and Anor [2022] 4 MLJ 779; [2022] 2 CLJ 757, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 181, 181B(4)(a)
Companies Act 2016 ss 347, 347(1), 348, 348(2), (4), (4)(a), (4)(b)

Appeal from: Originating Summons No WA-24NCC-151–03 of 2018 (High Court, Kuala Lumpur)

Lambert Rasa-Ratnam (with G Vijay Kumar, Chan Mun Yew, Shona Rukmini Dutta Yean and Brandon Loo Yung) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Cyrus V Das (with David Thomas Mathews, Malarvily Perumal, Lai Ann Xing and Olivia Loh) (Gananathan Loh) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] On 19 September 2016 at around 12.20pm, a tug boat vessel NTT Lumut belonging to the respondent, while berthed along a jetty at Teluk Rubiah Maritime Terminal in Perak, sank with its hull resting on the seabed ('the incident'). The vessel was in a laid-up state which meant it was temporarily not in use.

[2] The incident triggered a ripple effect of events which culminated in the appellant seeking leave of the court under ss 347 and 348 of the Companies Act 2016 ('the CA 2016') to initiate derivative proceedings in the name of the

respondent against Azimuth Ship Management Sdn Bhd (ASM) for negligence.

[3] The High Court dismissed the application and we affirmed that decision. We now give our reasons.

PARTIES

[4] The respondent is in the business of owning, leasing, chartering and hiring boats, ships and vessels. The respondent is a joint venture between Azimuth Marine Shd Bhd ('Azimuth Marine') and Nautical Supreme Sdn Bhd ('Nautical Supreme'). The current shareholders of the respondent are Azimuth Marine (70%), Nautical Supreme (20%) and one Jaya Sudhir (Jaya, 10%).

[5] There are two shareholders in Azimuth Marine namely East India Shipping Corp Sdn Bhd ('East India Shipping') and Dato Ahmad Johari bin Tun Abdul Razak ('Johari'). East India Shipping owns 75% of the shares in Azimuth Marine with the majority owned by Dato Seri Suresh Emmanuel Abishegam ('Capt Suresh') and his family.

[6] The appellant is a director of Nautical Supreme along with Dato Wan Mohamed Yaacob ('Wan') and another.

[7] At the time of the incident, the board of directors (board) of the respondent consisted of:

(a) Johari, Capt Suresh, one Latiff and a Hari Das (all as nominees of Azimuth Marine); and

(b) the appellant and Wan, both as nominees of Nautical Supreme.

[8] Jaya was voted in as a director on 2 November 2016.

[9] The nominees of Azimuth Marine together with Jaya are the majority directors, as it were, and the appellant and Wan, as nominees of Nautical Supreme, the minority directors. The chairman of the board is Johari and Capt Suresh the Chief Executive Officer.

Relationship with Vale

[10] The respondent was specifically formed as a joint venture to undertake a project with Vale Minerals Malaysia Sdn Bhd ('Vale'). Vale is the respondent's sole customer. The respondent was required to construct, own and operate seven harbour tugs to be chartered to Vale to provide harbour tug services to Vale. This included the 'NTT Lumut'. Parties thereupon entered into a

harbour tugs services agreement on 11 April 2013 ('HTSA'). A

Relationship with ASM

[11] Pursuant to a Baltic and International Maritime Council Standard Ship Management Agreement dated 12 April 2013 ('SIMCO'), the respondent appointed ASM as the designated ship manager to manage and operate the harbour tugs and to provide the harbour tugs services on behalf of the respondent for a period of 15 years. B

Events after the incident C

[12] A day after the incident, Capt Suresh informed the board. The appellant by email dated 28 September 2016 wrote to the chairman and the board to hold Capt Suresh and ASM personally liable for the incident. D

[13] At the board meeting on 2 November 2016, the appellant called for an independent inquiry to be undertaken as Capt Suresh and ASM were conflicted. The board was informed by Capt Sashi of ASM, that Vale, the Marine Department and the insurers had undertaken investigations which indicated an accident. E

[14] There were several board meetings on 7 December 2016, 8 February 2017 and 31 March 2017 wherein the appellant requested for an independent investigation. The request was rejected on the basis that investigations were ongoing. On the 14 November 2017 board meeting, the board was informed the insurers had paid out more than RM20m, the Marine Department had concluded its investigation and issued a document of compliance ('DOC') on 1 February 2017. The board resolved that an independent investigation was not needed. F G

[15] The appellant appointed an expert, Alan Loynd ('Loynd'), to look into the cause of the incident. His preliminary report dated 23 November 2017 stated he did not have sufficient evidence to fully explain the loss but a number of questions should be addressed and the questions were set out. He concluded the incident could and should have been prevented. A supplementary report dated 4 December 2017 was prepared in response to a question from the appellant's solicitor to state that in the absence of a satisfactory answer to the questions posed, the sinking could have been avoided with the reasons given. H I

[16] Loynd's reports were sent to the board on 11 December 2017 to require written confirmation that the board would furnish satisfactory answers to the questions raised and for Loynd to be granted unrestricted access to inspect the wreckage in order to provide a report on his findings.

[17] An emergency board meeting was convened on 9 January 2018 to discuss the matters raised by the appellant. It was informed the insurance proceeds received of USD8m exceeded the value of the vessel if it were to be repaired and chartered, based on the valuation of USD4.1m. The DOC had also been issued. The board refused the appellant's request.

[18] The appellant then issued its statutory notice under s 348 of the CA 2016 dated 18 January 2018.

[19] This was followed by another emergency board meeting on 23 January 2018. The board decided to accede to an independent investigation and the chairman be mandated to appoint surveyors with a budget of USD100,000. The appellant voted against the proposal and requested that twi experts be appointed, one by the majority directors and one by the minority directors. The board did not agree to this.

Leave application for derivative proceedings

[20] The leave application was filed on 16 March 2018 and dismissed by the High Court on 27 May 2019.

DECISION OF THE HIGH COURT

[21] The High Court judge ('HCJ') stated that in deciding whether to grant leave, the requirements of s 384(4) of the CA 2016 had to be taken into account. These relate to whether the appellant is acting in good faith and whether it appears prima facie to be in the best interest of the company.

[22] On good faith, *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 was cited for the proposition that 'if no reasonable cause of action, and one that has a reasonable prospect of success, can be demonstrated or if there is a collateral purpose for wanting to initiate proceedings, such would be incompatible with the required good faith in seeking to initiate proceedings in the name and on behalf of the company'.

[23] It was stated the application was in essence predicated on the appellant's inability to convince the board to obtain an independent investigation into the incident. It was said that there is no independent investigation that satisfies the appellant where the board had commissioned M3 Marine.

[24] The appellant was said to lack good faith where Loynd's reports were preliminary and inconclusive and its final opinion 'remains at large'. Against these were the reports prepared by Vale, Braemar (the insurers' loss adjuster) and M3 Marine which did not suggest any negligence on the part of ASM.

[25] The HCJ also found the issues of subrogation where the respondent had been indemnified by its insurers and the terms of SIMCO that ASM was not liable to pay damages if found liable made it difficult to conclude there exists a cause of action in negligence and one with a reasonable prospect of success.

[26] It was recognised that a s 348 application is itself indicative of disagreement but is not per se indicative of any collateral purpose or bad faith. If the underlying purpose is to further a dispute or create a controversy or to disrupt an opposing party's management of the company that would be pursuing a collateral purpose not compatible with the interest of the company. However, it was clear that the minority and majority directors have disputes that are the subject matter of ongoing litigation and that such disputes can impair one's judgment. Reference was made to *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1; [2004] 3 SLR(R) 1.

[27] The requirement of prima facie in the best interest of the company was said to be a higher standard than merely being in the interest of the company. This stringency is mitigated by the best interest of the company being assessed on the basis of it appearing prima facie to be so.

[28] The factors considered in relation to good faith are also relevant to whether the derivative action would be in the best interest of the company.

[29] It would not be in the best interest of the company if the action to be initiated is not supported by any evidence or concluded opinion that there exists a reasonable cause of action and one that has a reasonable prospect of success. There was no consideration to the legal cost and whether such an action would be worthwhile bearing in mind the insurance monies received and the close out agreement with Vale. The proposed legal action may jeopardise the respondent's relationship with Vale. This was with reference to a letter dated 13 February 2018 from Vale. The HCJ stated it is not likely to be Vale's preference to do business with a company that is steep in internal disputes to the extent of there being legal suits and Vale's personnel being required to testify.

[30] The other considerations were that there was in fact no decision by the board not to pursue any legal action against ASM and it was premature to seek leave as the appellant had not proposed commencement of legal action to the board or secured evidence to support a cause of action. Further it cannot be assumed that if the option of suing ASM was proposed, Capt Suresh would not abstain from voting or that the other directors would not maintain fidelity to their fiduciary duty.

SUBMISSIONS OF THE APPELLANT

[31] On the requirement of good faith, it was submitted the HCJ did not focus on the most critical aspect which was the lack of independence of Capt Suresh and the majority directors and how they used their numbers and position to stifle and block a proper, transparent and independent investigation into the incident. As per *State of South Australia and another v Marcus Clark* (1996) 19 ACSR 606, if a director is conflicted by reason of having an interest in the subject matter involving the company he must abstain from all deliberations involving that matter. This was not done by Capt Suresh who participated in all deliberations and blocked any independent investigation and refused to answer Loynd's questions or allow access to the wreckage.

[32] The finding of the HCJ that Loynd's report was preliminary and not finalised was without regard to the fact it was Capt Suresh and the majority directors who prevented the report from being completed.

[33] The HCJ had not dealt with Capt Suresh's interest in ASM, his failure to abstain from deliberations on the incident and that the majority directors were acting in concert with Capt Suresh to block the investigation.

[34] The investigation by M3 Marine was tainted as it was not independent as it was commissioned solely by the majority directors who determined the scope of investigation and the information to be provided. The minority directors were excluded.

[35] Even if Loynd had not finalised the report, he disagreed with M3 Marine's report and gave reasons why they were wrong. There was thus conflicting expert evidence such that it cannot be resolved at this stage. A plain reading of the reports from Vale and Braemer showed they did not conduct an investigation into the cause of the sinking of the vessel.

[36] The HCJ did not analyse what were the legal impediments to the proposed action but merely set out the rival contentions.

[37] With regard to prima facie in the best interest of the company, there was no consideration that at the leave stage, the threshold is very low (*Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 and *Abdul Rahim bin Suleiman (suing as the director and minority shareholder of Semangat Motor Sdn Bhd and in the interest of Semangat Motor Sdn Bhd) & Anor v Faridah bt Md Lazim & Ors* [2016] 6 MLJ 449).

[38] There was evidence that ASM was negligent. Although Loynd was

unable to conclude his report, he had prepared two reports stating why he disagreed with M3 Marine and why the sinking could have been avoided. A

[39] The potential cost of litigation was unsupported by evidence. The appellant had in fact showed the respondent had lost USD1.2m as a consequence of the sinking and it is improbable any litigation cost would come close to such an amount. B

[40] As to the respondent's relationship with Vale being affected, there was no consideration to the appellant's response to Vale where he explained the prevailing circumstances and the reasons for the action. C

[41] With regard to the other considerations, the efforts of the appellant to procure an independent investigation had been disregarded. As to the possibility of Capt Suresh abstaining, the fact remains he had never abstained from any deliberations. D

SUBMISSIONS OF THE RESPONDENT

[42] The respondent submitted it suffered no financial loss. It claimed RM22,235,591.90 ('USD5.2m') under the Marine Hull Policy ('MH Policy') and USD153,002.18 under the Protection and Indemnity Policy ('PI Policy'). From the MH Policy RM19.8m was used to settle the loan with EXIM Bank, the mortgagee of the seven tug boats. NTT Lumut was removed from the HTSA for a close out compensation sum of USD3.5m from Vale. This was approved by the board, including the appellant on 14 November 2017. E F

[43] The respondent had commissioned a report from Parker Randall to assess and compare the values of NTT Lumut in three different scenarios. It was concluded there was no financial loss as the net income received from the insurance and compensation from Vale was higher if compared to the continuing operations on full charter or laid up rates. The HCJ had considered the Ferrier Hodgson report dated 27 July 2018 commissioned by the appellant where it did not suggest the conclusions in the Parker Randall report were wrong. G H

[44] It was next submitted the derivative action was bound to fail as any right or action the respondent has against ASM would have been subrogated. Further the respondent, ASM, Vale and EXIM Bank were all co-insured under the same insurance policies such that one co-insured cannot claim against another. Reference was made to *Gard Marine & Energy Ltd v China National Chartering Co Ltd; The Ocean Victory* [2018] 1 All ER 832. I

[45] There was also no liability under SIMCO.

[46] The next point of submission was that Loynd's reports were inconclusive as opposed to the reports from M3 Marine and Braemar which attributed the incident to inclement weather and low King spring tide.

[47] There was a collateral purpose which was to attack and discredit Capt Suresh and ASM, to disrupt the functions of management and the board and to jeopardise the respondent's commercial interest. There is now a suit by the respondent against Nautical Supreme, the appellant and Wan for breach of fiduciary duties and conspiracy (WA-22NCVC-163–05 of 2017).

[48] The appellant had not satisfied the element of good faith in that there was no good cause of action and a reasonable prospect of success. These were apparent from the reliance on the inadequate and inclusive Loynd report as opposed to the reports from M3 Marine and Braemar. The possible legal impediments also had to be considered. Although the HCJ did not make a finding on the opposing contentions the very fact of such contentions made it difficult to conclude there existed a good cause of action in negligence against ASM and one with a reasonable prospect of success.

[49] In considering ulterior purpose, the court can look into the objective and purpose of the derivative action in the context of whether the objective is to do justice to the company or to advance the collateral purpose of the applicant, *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor* [2015] 11 MLJ 604. It was submitted the appellant did not have the best interest of the respondent and sought to interfere in the management of the incident, in pursuing an independent investigation and when agreed to by the board, he voted against it. Due consideration too had to be given to the on-going disputes which the HCJ stated can impair one's judgment.

[50] In assessing interest of the company, *Ang Thiam Swee v Low Hian Chor* recognises there can be an overlap between what is 'in the interest of the company' and 'good faith'. It could well be that it is prima facie not in the best interest of the company to grant leave due to other considerations. These considerations were the cost benefit where the respondent had been indemnified by the insurers and compensated by Vale, the costs of litigation and the jeopardy to the relationship with Vale. There was also no decision by the board not to pursue any legal action against ASM.

OUR DECISION

[51] Section 347(1) of the CA 2016 provides that a complainant may, with leave of the court initiate, intervene in or defend a proceeding on behalf of a company. Section 348(4) then states as follows:

(4) In deciding whether or not leave shall be granted, the Court shall take into account whether — A

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted. B

[52] It is common ground that in order for leave to be granted, the appellant must prove that he is acting in good faith and that it is prima facie in the best interest of the company for leave to be granted. C

Good faith

[53] We start with the decision of this court in *Celcom* which laid down several important principles. Although this case was on the interpretation of s 181B(4)(a) of the Companies Act 1965 ('the CA 1965'), we agree with the HCJ the ratio of that case on good faith can be applied to our s 348(4)(a) of the CA 2016 as both provisions correspond with each other. D

[54] *Celcom* states at p 647: E

[15] The second crucial requirement for the determination of the court in granting leave is the need for the respondent to show that he is acting in good faith in making this application (s 181B(4)(a)). The onus of proof here is on 'the respondent on a balance of probabilities. The test of good faith is two-fold. One is an honest belief on the part of the respondent, and two, that this application is not brought up for a collateral purpose'. F

[55] Further at p 649, this was said:

[16] The second requirement will depend on the factual circumstance which comes before the court. This was stated by Palmer J in *Swansson* with these words: G

> Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds this belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process. H I

[56] Good faith thus entails a honest belief that a good cause of action exists and has a reasonable prospect of success. It must also not be for a collateral purpose.

Good cause of action and reasonable prospect of success

[57] The proposed cause of action was against ASM in negligence. The HCJ found the appellant's reliance on Loynd's preliminary and supplementary reports wanting. We agree with that finding as the preliminary report (encl 76) stated 'At the moment, I do not have sufficient evidence to fully explain the loss of NTT Lumut, but a number of questions should be addressed' (p 282) and 'My feeling, based upon the evidence I have seen, is that this casualty could and should have been prevented' (p 284). His supplementary report (encl 76/306) was essentially to the effect that if no satisfactory answers to the questions are given, then he believes the sinking of NTT Lumut could have been avoided. No answers were forthcoming and the HCJ found that whether the answers would satisfy Loynd or not does not arise and that Loynd's report remains at large (para 129).

[58] The fact too that the appellant is also seeking unrestricted access to Loynd to inspect the wreckage to enable him to complete his investigation and deliver his final report (prayer 2(d), encl 1), would in itself show that Loynd's reports were not final. By no means can such a report form the basis for a good cause of action in negligence.

[59] On the other hand, we agree that there were reports from M3 Marine and Braemar, to point towards no negligence. M3 Marine's report was dated 23 May 2018 (encl 77/67–99). At para 3.1.6, the scope of work was 'to inspect the damage at current location and investigate and comment on any shortfalls in operational and technical management that led to the casualty'. At para 5.1.2 it was noted 'the tidal range' played a significant part in this incident. The conclusions were, inter alia, as follows:

> 6.1.1 The Tug was managed by the Managers, an International Ship Management company and a member of Inter Manager.
>
> The Government of Malaysia through the MMD issued the Managers the Document of Compliance (DOC) in accordance with the International Safety Management Code (ISM) on 20th November 2015 with a validity to 10th November 2020. This certification is the documentary evidence that the Safety Management System of the company is in full compliance with the ISM code and that Managers have shown diligence in setting up their management systems and the Safety Management Systems on their respective Tugs.
>
> The DOC is subject to annual review and post the Tug's incident, the DOC was renewed on 1st February 2017.
>
> The Managers were in compliance with the ISM code before, during and after the casualty which is high level evidence of a safe, diligent and well-run company.
>
> ...

> 6.1.11 This incident was caused by the Tugs hull being caught underneath the quay fender. 1t is believed that even though the rubber facing of the fender was worn down and no matter how good a condition the fender was in, the Tug being caught underneath the steel part of the fender was not thought possible given the long period the Tug had been at the jetty, through many tidal cycles, including Spring tides that had lows even lower than the tide at the time of the incident. The pressure of the rising tide against the hull coupled with the added pressure caused by the inclement weather and the steel vertical component of the fender pierced the hull of the Tug.
>
> In layman's terms, if the quay fender was brand new the incident and the resultant submerging would still have happened.

[60] M3 Marine had made reference to the DOC issued by the Marine Department (Appendix D p 93). Although the completion date of verification was 20 November 2015, which is before the incident, the fact that it was issued on 1 February 2017 and valid until 19 November 2020 would suggest that the Marine Department who was aware of the incident and went to the terminal on the day itself was satisfied that as per the certificate, 'the safety management system of the company has been audited and that it complies with the requirements of the International Safety Management Code for the Safe Operation of Ships ...'.

[61] Braemar's report is dated 4 May 2017 (encl 76/187–215). Braemar is the adjuster to the insurers, Allianz, and reported that the damage to the vessel was reasonably attributed to the alleged cause as follows (p 193):

> CAUSATION
>
> Owners allege that the damage occurred as follows:
>
> Quote:
>
> NTT LUMUT under heavy weather and swell came fast onto the MHQ fenders and sustained a hull breach. Flooding took place in the steering compartment and subsequently in the E/R. The vessel is currently in her same lay-up position but the entire aft section is submerged in water.
>
> In our opinion the damage found could be reasonably attributed to the alleged cause.

[62] The sum total of these reports coupled with the DOC would show no negligence on the part of ASM. The cause of the sinking was attributed to inclement weather and tidal conditions. We do not find that Loynd's report which is inconclusive and incomplete and a final opinion which is at large can be said to the basis for a good cause of action.

[63] The complaint was that the HCJ had not considered the reasons why

A Loynd's report was as such where it was attributed to the lack of independence of Capt Suresh and the majority directors and the conflict situation of Capt Suresh being the owner of ASM. These resulted in the attempt to block the appellant's call for an independent investigation.

B **[64]** We firstly note that the appellant and Wan were fully aware of Capt Suresh being the owner of ASM and the SIMCO agreement between the respondent and ASM.

C **[65]** Secondly, reference must to be made the events which unfolded after the incident. Capt Suresh informed the board a day after the incident by email dated 20 September 2016. We find it most telling that the appellant's first response, nine days after the incident, was to send an email dated 28 September 2016 (encl 79/120–121) to the chairman that Capt Suresh and ASM ought to be held personally liable. At the board meeting on 2 November 2016, the
D appellant called for an independent investigation due to the conflict situation. Hari Das, the then director, expressed that there were adequate investigations being carried on. The appellant informed he may consider a s 181 action.

E **[66]** Other meetings would show the board had resolved to defer the issue pending availability of reports and investigation from the Marine Department, the insurers had paid out RM20m and the DOC had been issued. After Loynd's report, the board had on 9 January 2018 resolved not to accede to the independent investigation where Hari Das stated the financial proceeds
F exceeded the vessel's value and the appellant responding to not look only at the monetary perspective (minutes of EGM, encl 76/312).

[67] After the statutory notice under s 348(2) of the CA 2016 was issued, the board on 23 January 2018 resolved to have an independent investigation and
G the mandate given to the Chair. This was opposed by the appellant and Wan who wanted two experts to be appointed, one by the majority directors and one by the minority (minutes of EGM, encl 76/319). The board's independent investigation was subsequently conducted by M3 Marine. This must have been the context under which the HCJ said no independent investigation satisfies
H the appellant.

[68] The events as outlined above show the ulterior motive of the appellant in continually demanding an independent investigation and when finally acceded to by the board, rejecting it and instead asking for two experts to be
I appointed, at the respondent's cost.

[69] Further, a ground for the leave application as stated in para 7.1 of the originating summons was that the sinking of the vessel had a substantial financial impact on the company. But yet the appellant could during the board

meeting on 9 January 2018 say to not just look at the financial perspective. This appears to be an inconsistent stand.

[70] The appellant had referred to *State of South Australia and another v Marcus Clark* where if a director is conflicted by reason of having an interest in the subject matter involving the company he must abstain from all deliberations involving that matter. At p 627 this was stated:

> On the whole of the evidence, I am satisfied that Mr Marcus Clark well knew of the conflict and deliberately did not disclose the conflict to the board, the executive and to the bank officers with whom he was dealing, and did not refrain from voting in favour of the transaction, when he well knew that he was duty bound to do both of those things. I can only assume that his motive in doing so was in order to avoid raising a matter which might have stood in the path of the acquisition proceeding. Strictly, however, the question of his motive is irrelevant.

[71] We note this case involved a claim for compensation by the State and the bank based on allegations that the defendant acted negligently in connection with the acquisition of a company 'O' and in breach of fiduciary duties. The refraining from taking part in the deliberations led to the acquisition of shares in 'O'. There was also a duty to disclose the defendant's various positions.

[72] Our instant appeal stands on a different footing as it involves a leave application for derivative action. Further, the fact of Capt Suresh being the owner of ASM and the SIMCO agreement between the respondent and ASM, is known to the appellant.

[73] Standing in the way of a reasonable prospect of success is the possible legal impediments referred to by the HCJ. It was said there was no analysis on the merits but rather a setting out of the rival contentions. Be that as it may, this would show this was what made it difficult to conclude the leave application was in good faith and interest of the company. These legal impediments of subrogation and no liability under SIMCO were viewed against the backdrop of the on-going disputes and no evidence of negligence (para 146). The HCJ had earlier noted the same in para 137.

[74] To take SIMCO as an example, cl 17(b)(i) (encl 76/95) provides that ASM shall be liable to the respondent for any negligence where such claim shall never exceed a total of ten times the annual management fee payable thereunder. The annual management fee payable is stated to be 'Nil' (refer to box 14 at p 77) where cl 12 on management fee and expenses (pp 93 and 94) have been deleted. It would thus appear there can be no liability of ASM towards the respondent.

[75] Moving on, the respondent has raised the issue that it and ASM are co-insured such that one co-insured cannot claim against another. Clause 10(c) of SIMCO (p 93) requires the respondent and ASM to be insured. Refer too to the MH Policy (encl 76/108) under the description 'Insured/Policy Holder' where ASM and the respondent are named. In *Gard Marine* this was stated at pp 865 and 872–873:

> [99] ... it is well established, and common ground between the present parties, that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other in respect of an insured loss. Co-insurance is the Paradigm case.
>
> ...
>
> [122] ... in my opinion, the reason why the owners have no claim against charterers for damages for loss of the hull is not that such a claim exists under cl 29 but is at some point discharged. It is that, under a co-insurance scheme like the present, it is understood implicitly that there will be no such claim. This understanding applies, in my opinion, whether or not the insurance moneys have yet been paid.

[76] The appellant relied on para 139 that the principle in *Gard Marine* is subject to contractual arrangement wherein there is cl 17 of BIMCO. It states at p 878:

> [139] The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract: see, for example, *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17; [2002] 1 All ER (Comm) 918; [2002] 1 WLR 1419.

[77] We find that cl 17 does not assist the appellant where although there is provision for indemnity and the Himalaya clause, the operative provision is still cl 10 which requires joint insurance. Hence the principle in *Gard Marine* that one co-insured cannot claim against the other and this is notwithstanding whether the insurance money has been paid, applies.

Collateral purpose

[78] The HCJ was conscious that the majority and minority directors have disputes that are the subject matter of ongoing litigation. It was in this context

that it was stated that 'Set against the backdrop of the obvious dispute', coupled with no evidence of negligence and the possible legal impediments, it was difficult to conclude there was good faith (paras 145–146). A

[79] As stated in *Pang Yong Hock* at p 7 hostility between the factions involved is bound to be present in most leave applications and is generally insufficient evidence of the lack of good faith. B

[80] In *Ang Thiam Swee* it was stated at p 347:

> 13 ... As such, it is not the questionable motivations of the applicant per se which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal purpose which indicates that the company's interests will not be served, ie, that s 216A(3)(c) will not be satisfied. This crucial distinction between the applicant's motivation or motive on the one hand and his purpose on the other has been neatly encapsulated in Palmer J's judgment in *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 ('Swansson') at [41] as follows:
>
> > To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant is entitled to sue ... On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

C D E F

[81] We cannot therefore say that the appellant has made out a good cause of action and a reasonable prospect of success such that the required good faith on the part of the appellant has not been established. G

Prima facie in the best interest of the company

[82] Section 348(4)(b) of the CA 2016 requires the court to take into account whether it appears prima facie to be in the best interest of the company that leave be granted. H

[83] The appellant had referred to *Abdul Rahim bin Suleiman* where at p 474 it was stated:

> ... We need only say on this aspect that firstly, the court in an application for leave, should not go into the merits of the case at the leave stage. Its role is to see if the application for leave is frivolous ... I

[84] It was contended that the HCJ did not consider the threshold is low. On

A the contrary, we find that the very case of *Abdul Rahim bin Suleiman* was considered. This was what was said in para 115:

> [115] Suffice to say, as was pointed out by the Court of Appeal in *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 at p 646, an application for leave under the former s 181B of the CA 1965, and thus equally an application under s 348 of the CA 2016, is not to be dealt with lightly and be considered with a low threshold similar to leave applications for judicial review.

B

[85] We note that this low threshold departs from *Celcom* at p 646:

C

> [8] ... As such, leave to bring a derivative action must not be given lightly (see *Swansson v RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was 'only an application for leave' and relying on the low threshold used under O 53 of the RHC (application for judicial review) ie to determine if an application for judicial review is not frivolous or vexations by relying on cases like *Clear Water*. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s 181A of the CA are met. A low threshold of merely determining if there existed a prime facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 18A of the CA, and compliance to those statutory requirements (see *Charlton v Baber* (2003) 21 ACLC 1671).

D

E

F **[86]** We would adopt and follow the threshold as stated in *Abdul Rahim bin Suleiman* and not *Celcom*. This court in *Tai May Chean v United Eastern Resources Sdn Bhd and Anor* [2022] 4 MLJ 779 at p 793; [2022] 2 CLJ 757 at p 770 noted the same with reference to *Abdul Rahim bin Suleiman* in its para 45. This same threshold has been followed in *Ang Thiam Swee* (a Singapore Court of Appeal decision) at p 360:

G

> 55 ... There is an obvious overlap here with the requirement of good faith, in that an applicant with a frivolous or vexatious claim will also typically be unable to demonstrate an honest belief in the merits of the proposed statutory derivative action or the absence of a collateral purpose amounting to an abuse of process ...

H

[87] Nevertheless, this does not detract from the application of the principles of what constitutes good faith and prima facie in the best interest of the company, as expounded in *Celcom.*

I **[88]** Frivolous or otherwise, it has still to be viewed in the light of 'prima facie in the best interest of the company'. The clear words of s 438(4)(b) cannot be ignored. In *Celcom*, the court stated at p 653:

> [28] ... The test of the interest of the company can be found in the Singapore case of *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] SGCA 18;

[2004] 3 SLR 1, in this passage:

> Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands 'to gain substantially in money or in money's worth' (per Choo JC in Agus lrawan) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial consideration for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

[89] The HCJ started on the footing that the factors to be considered would be the same as that of good faith. We find this to be in line with *Ang Thiam Swee*. Consequently, this would mean that it is not in the best interest if there was no evidence to support a good cause of action and one with a prospect of success.

[90] We noted earlier a ground for leave was the sinking had a substantial financial impact on the respondent. However, the respondent was paid USD5.2m from the MH Policy, USD153,002.18 under the PI Policy and a close out compensation sum of USD3.5m from Vale (encl 76/260–262). This is to be contrasted with the appellant's value of the vessel of USD4. 1m (FHMH report dated 24 October 2017). This value was on NTT Larut which has the same specification as the sank vessel, NTT Lumut. There was also a Parker Randall report dated 18 June 2018 (encl 77/100) where at p 122 it was concluded the net income from the insurance proceeds and compensation from Vale is higher than if compared to the vessel's continuing operations. It was noted the appellant's FHMH report did not suggest the conclusions in the Parker Randall Report was wrong. This meant there was no financial loss to the respondent which would mean it was not prima facie in the interest of the respondent for derivative action to proceed.

[91] Being cognisant that the court must weigh all circumstances and decide whether a claim ought to be pursued as per *Pang Yong Hock*, we also considered there could be genuine commercial considerations in not pursuing a claim such as in not wanting to damage a good long term profitable relationship. This brings us to Vale, the respondent's sole customer and the reason why the respondent was established as a joint venture. Given this context, we find that the HCJ was correct to say that the respondent's relationship with Vale would be affected if there was a claim made against ASM. The letter dated 13 February 2018 from Vale to the respondent is most relevant where Vale had considered the incident to be closed with the close out agreement (para 4). Paragraph 5

A then went on to say:

> We are aware of a number of disputes involving shareholders and/or officers of NTT. We wish to stress that Vale makes no comment on the merits of any parties' case and would wish to be impartial in any dispute. We do not wish to be drawn into those matters.

B

[92] A concern was expressed in para 6 of the need to safeguard confidentiality.

C **[93]** The appellant submitted his response to Vale dated 20 March 2018 (encl 77/63–66) had not been considered by the HCJ and the fact that Vale did not reply meant Vale accepted the appellant's explanation. At best, this is speculative in the light of the strong and clear concerns expressed by Vale in its letter dated 13 February 2018.

D

[94] The other commercial decision would be the potential legal costs to be incurred. This would include the costs of experts and appeal from the High Court. This has surely to be weighed against what the respondent has received from the insurance and Vale and what the appellant says is the loss of at least E USD1.2m.

[95] Weighing the cost, risk and distraction caused by the intended litigation, we cannot say if this is prima facie in the best interest of the respondent, especially when its sole customer, Vale, had considered the matter F closed. This could well be an instance where the end does not justify the means.

CONCLUSION

[96] The appeal was therefore dismissed and the decision of the HCJ in not G granting leave for derivative action was affirmed. Costs of RM20,000 was awarded to the respondent, subject to allocatur.

Appeal dismissed and High Court's decision affirmed.

H Reported by Ashok Kumar

I